LIBRARY
SUPREME COURT, U. S.

FILED
MAR 15 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, Attorney General, et al.,
Petitioners,

vs.

ROBERT BUSTOS, et al.,

No. 73-480

CRISTOBAL CARDONA, et al.,
Petitioners,

vs.

WILLIAM B. SAXBE, Attorney General, et al.,

Amicus Curiae Brief

RICHARD D. MALTZMAN
PHILIP B. BASS
555 California Street
San Francisco, California 94104
Attorneys for Bud Antle, Inc., Amicus Curiae

HASKELL TITCHELL
PAUL R. MALONE
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Interest of Amicus Curiae	1
Description of Amicus Curiae's Employees	2
Effect of Lower Court Opinion on Amicus Curiae's Employees	3
Argument	7
1. All Classes of Antle's Employees Were Lawfully Admitted to the United States as Resident Aliens	7
2. Common Law Concepts of "Residency" Have No Relevance to Migrant Workers	8
3. Deprivation of a Worker's Right to Return to His Employment in the United States by Reclassifying Him as an "Alien Commuter" Would Be an Unconstitutional Denial of Due Process in Violation of the Fifth Amendment of the United States Constitution	9

TABLE OF AUTHORITIES CITED

Cases	Pages
Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964)	13
Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884	9, 10, 12
Gooch v. Clark, 433 F. 2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995, 91 S. Ct. 2170, 29 L. Ed.2d 160	5
In Re Griffiths, ... U.S. ....., 93 S. Ct. 2851 (1973)	9
Schneider v. Rusk, 377 U.S. 163, 84 S. Ct. 1187, 12 L. Ed. 2d 218 (1964)	9, 10
Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)	10
Sugarman v. Dougall, ... U.S. ....., 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973)	9
Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948)	12
Traux v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131	12
Wong Wing v. U.S., 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896)	9

Statutes and Regulations	
8 C.F.R. 211.1(b)(1)(1972)	11
8 USC § 1101(a)(27)(B)(1970)	11

Constitution	
United States Constitution:	
Fifth Amendment	9, 10
Fourteenth Amendment	9

Texts	
Stumberg, *Principles of Conflict of Laws* (3rd Ed. 1963) page 36	10

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

WILLIAM B. SAXBE, Attorney General, et al.,
Petitioners,

vs.

ROBERT BUSTOS, et al.,

No. 73-480

CRISTOBAL CARDONA, et al.,
Petitioners,

vs.

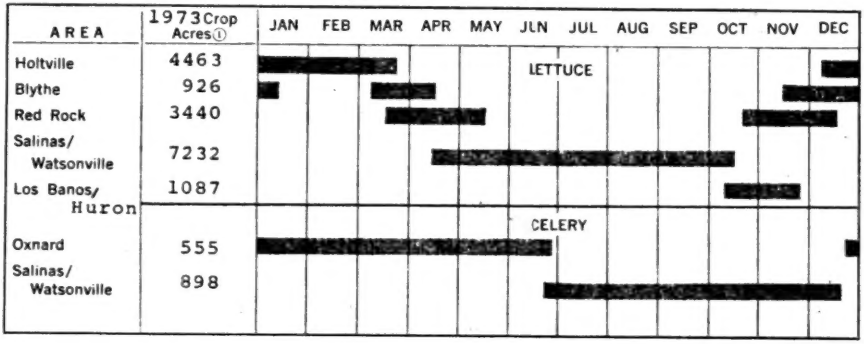
WILLIAM B. SAXBE, Attorney General, et al.,

Amicus Curiae Brief

INTEREST OF AMICUS CURIAE

Bud Antle, Inc. (Antle), with its home office in Salinas, California, is one of the nation's largest growers and shippers of iceberg lettuce and celery. It farms and harvests lettuce in the Salinas-Watsonville area of Central California, Los Banos and Huron in the San Joaquin Valley of California, Blythe, California (approximately 100 miles from the Mexican border), Holtville, California in the Imperial Valley adjacent to the Mexican border, and in Red Rock, Arizona (approximately half-way between Phoenix and Tucson). It farms and ships celery from Salinas-Watsonville and Oxnard, California. It ships both products on a year-round basis to customers throughout the United States by staggering its production as follows:

HARVEST SEASONS



DESCRIPTION OF AMICUS CURIAE'S EMPLOYEES

Antle is an integrated producer with growing and harvesting operations, shops, packaging plants, vacuum cooling plants, loading facilities, trucking operations and other support activities. A substantial portion of its employees are of Mexican origin and all of its employees, except for certain executive and clerical help, are represented by various unions. Antle's field workers are represented by Local 890—General Warehousemen's and Teamsters' Union with its principal office in Salinas, California. A substantial majority of its field workers, including all of its harvest workers, have been represented by Local 890 for more than a decade.

Those employees engaged directly in farming are for the most part migratory and move from production area to production area to coincide with the harvest seasons of the company. In spite of this movement, over half of the company's 800 to 900 harvest workers work year-round for the

1. As more than one crop per year may be grown on the same acreage, the number of crop acres generally is in excess of gross land acres.

company, moving from one harvest area to another as they are needed. Many workers also work for different employers during parts of the year, possibly to avoid movement of their families. Many also take advantage of unemployment insurance provided by the company under its union contract and elect not to move with the company's field operations, or limit their moves. Thus, an employee is able to work for the company in lettuce harvesting for six months in the Salinas area and almost four months in the Holtville area, receiving unemployment insurance for the gaps between.[2] In this way, they can move their families only once during the year, settling them in the Salinas-Watsonville area for two-thirds of the year and in the Imperial Valley or neighboring Mexicali in Mexico for approximately one-third of the year.

EFFECT OF LOWER COURT OPINION ON AMICUS CURIAE'S EMPLOYEES

The opinion of District Judge Pratt in the within proceedings reached certain conclusions of fact which are not supported by the record and which are wholly inaccurate with respect to many of the workers which would be affected by the *Bustos* decision. Firstly, the statement at page 6 of the opinion (Petitioner's petition for Writ of Certiorari—page 20) that "... the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country ..." is not only unsupported by the evidence, but is demonstrably untrue, at least as it applies to Antle's operations and, we believe, agriculture in general in California and Arizona. Most large farmers in lettuce and grapes, the two industries which the respondent United Farm Workers ("UFW") is

2. Antle employees received over $400,000 in unemployment insurance benefits during 1973.

attempting to organize, have already been organized by a competing union or are already represented by the UFW. In either event, the workers' earnings are comparable to earnings in industry in general. Earnings of $10,000 per annum and more per worker are more the rule than the exception.

Secondly, Antle's field supervisors, who are intimately familiar with the personnel working under them, estimate that well over 60% of the green card harvest workers have had their cards since prior to 1965.

Thirdly, Judge Pratt's division of Green Card workers coming over from Mexico into two categories ("daily" commuters and "seasonal" commuters) is unrealistic. Antle has undertaken an extensive investigation of its own field force in an attempt to ascertain the effect of the *Bustos* Ruling on its employees. As a result, it determined that its workers in general fall into one of the following *seven* categories (percentages are company estimates):[3]

Category	Description	Est. Percentage
I.	*U.S. Citizens* (by reason of birth or naturalization)	5-10%
II.	*Year Round U.S. Residents* (green card workers who always or almost always live and sleep in the U.S.)	35-40%
III.	*Mexican Residents who Commute Daily Year Round* (green card workers who maintain a permanent home in Mexico, have a permanent job in the U.S. near the border, and who commute to work across the border daily all year round)	1%
IV.	*Mexican Residents who Commute Only Seasonally* (green card workers who maintain a permanent home in Mexico, and leave their homes and families for six months or less each year to work one or two harvest seasons in the U.S.)	5-10%

3. Paradoxically, Respondent UFW represents the employees of one of Antle's principal competitors, Interharvest, Inc., and its employees (and UFW members generally) would essentially fall into these same categories.

Category	Description	Est. Percentage
V.	*Permanent Residents of Mexico who Follow U.S. Harvest Seasons Year Round* (green card workers who maintain a permanent year-round home in Mexico, but who work year-round in the U.S. following harvest seasons. These people actually sleep in Mexico only during the El Centro and Blythe seasons)	15-20%
VI.	*Hybrid Residents* (green card workers who work year round in the U.S. following growing seasons, and who rent housing in Mexico during the southern season and rent in Salinas during the northern seasons)	30-35%
VII.	*Salinas Residents* (workers who, like hybrid residents, always live where they work, but who maintain housing year round in the Salinas area, and only rent while away from Salinas)	5-10%

Those workers who fall into categories I, II, and VII are clearly not affected by the *Bustos* decision. Those workers falling into category III have been found to be exempt by both *Bustos* and *Gooch*.[4] There are only nine workers for the company who actually fall within category III (these are tractor drivers who work year-round for the company in the Holtville-El Centro area). Categories I, II, and VII total approximately 45-50% of Antle's field work force.

The only workers who are expressly and specifically affected adversely by *Bustos* are those in category IV, the "seasonal workers". They comprise only 5-10% of Antle's work force.

Antle estimates that approximately half of its field work force, however, falls into categories V and VI. The *Bustos* decision appears to leave the status of these workers in various degrees of doubt. Particularly is this true in view of the statement by the Immigration Service in its petition for Writ of Certiorari that ". . . [i]f the seasonal commuter

4. Gooch v. Clark, 433 F 2d 74 (9th Cir. 1970), cert. denied. 402 U.S. 995, 91 S. Ct. 2170, 29 L. Ed.2d 160.

system is illegal, the Service must move to pick up all alien registration receipt cards of aliens adversely affected by the decision and to deny them re-entry for the purpose of seeking or returning to employment." Category V workers are distinguishable from category VI and category VII workers only in the fact that they own a residence or home in Mexicali. Category V, VI, and VII workers all work essentially year-round for Antle[5] and all generally move their families with them from location to location. In fact, Antle estimates that approximately 99% of its green card workers have some family; about 80% take their families with them when they move from one area to another, and at least 60% of these workers have at least one other family member working for the company. Thus, the only difference between the workers in categories V, VI, and VII is that the workers in category V would be deemed under common law principles to have a permanent residence in Mexico, the category VI workers would be deemed to have no permanent residence under common law principles or a permanent residence that moved with them from place to place[6], and the category VII workers would be deemed to have a permanent residence in Salinas.

As can be seen from the foregoing, during the period from early December through late March of each year, when Antle is engaged in harvesting operations in the Imperial Valley, approximately 50-60% of its field workers live in Mexicali and its environs on the Mexican side of the border. This percentage is substantially lower for the remainder of the year. Furthermore, after the Imperial Valley harvest is

5. Or Antle and other U.S. employers.

6. and thus the category VI workers could arguably be held to have a "permanent residence" in Mexicali during the period they live there.

completed, approximately 70% of the work force moves to Red Rock, Arizona and approximately 30% moves to Blythe. From Blythe, where temporary housing is extremely difficult to obtain, workers can commute daily to the Calexico-Mexicali area, which most do. The trip is approximately 100 miles but Antle provides transportation to Calexico for the convenience of its employees. Of the 70% of the work force which moves to Arizona, none live in Mexico to the company's knowledge, although Nogales, Mexico, is closer to Red Rock than Blythe is to Mexicali.

Categories V, VI, and VII workers are thus an anomaly: They are "daily commuters" for three to five months out of the year and "seasonal commuters" for the balance of the year, as those terms are defined in *Bustos,* yet all are essentially full time permanent employees of one American company, or are employed by several American employers year-round. Their employment in the United States is permanent although the situs of that employment is not fixed. But the category VII worker, alone among the three categories, appears to be immune from the effect of *Bustos.*

ARGUMENT

1. All Classes of Antle's Employees Were Lawfully Admitted to the United States as Resident Aliens.

The court erred in *Bustos* by premising its review of the position of green card holders upon their present "common law residence." In fact, all green card holders must be presumed to have legally received their original immigration visas. These green card holders are not before the court and it is elementary that if they came into this country as resident immigrants and established that status, they are entitled to the same Constitutional protections as any other resident alien.

2. Common Law Concepts of "Residency" Have No Relevance to Migrant Workers.

The only sin which these green card holders have visited upon America is that they, to a large extent, are migrant workers. Standard concepts of "common law residency" have no relevance when considering whether migrant green card workers lawfully admitted to the United States as resident immigrants should be denied that status for want of a "permanent residence" within the United States.

Thus, Antle's category VI workers, the "hybrid residents", are, by Judge Pratt's standards, residents of Mexico for from three to five months out of the year and residents of the United States from seven to nine months out of the year.

But in fact, the workers in categories V, VI, and VII may live side by side and work side by side throughout the year, the only difference being that the worker in category V owns a small home in Mexicali and rents the rest of the year, the worker in category VII owns a small home in Salinas and rents the rest of the year and the worker in category VI rents all year. Any distinction between one worker and the other predicated upon common law concepts of "residency" is thus totally arbitrary under the existing circumstances and discriminates against migrant workers in favor of those workers who have permanent employment at one location which, by Judge Pratt's reasoning, substitutes as his fictional "residence" when he commutes to it on a daily basis.

3. Deprivation of a Worker's Right to Return to His Employment in the United States by Reclassifying Him as an "Alien Commuter" Would Be an Unconstitutional Denial of Due Process in Violation of the Fifth Amendment of the United States Constitution.

It must go without question that if a person is admitted to this country from Mexico as a resident alien, he is fully protected by the due process clause of the Constitution. *Wong Wing v. U.S.* 163 US 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896). Recently this court in *Sugarman v. Dougall* ..... U.S. ....., 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973) held that New York's civil service law provision that only United States citizens could hold permanent positions in the competitive class of the state's civil service violated the Fourteenth Amendment's equal protection guarantee. It held likewise in *In Re Griffiths* ..... U.S. ....., 93 S. Ct. 2851 (1973) that a Connecticut statute restricting admission to the bar to citizens was a violation of the equal protection clause of the Fourteenth Amendment.

While the Fifth Amendment does not contain an "equal protection clause" as does the Fourteenth Amendment which applies only to the states, it has long been the law that ". . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884. As stated by Mr. Justice Douglas in *Schneider v. Rusk,* 377 U.S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218, 222 (1964), quoting from *Bolling v. Sharpe* supra:

> "Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"

In *Schneider,* this court struck down a federal statute which discriminated between the rights of naturalized citi-

zens v. native-born citizens to live and work abroad indefinitely.

Likewise, in *Shapiro v. Thompson* 394 U.S. 618, 642, 89 S. Ct. 1322, 1335, 22 L. Ed. 2d 600, 619 (1969) this court struck down the one-year waiting period for welfare benefits by new residents in two states and the District of Columbia. The decision against the states was founded on the equal protection clause of the Fourteenth Amendment, but Congress' exercise of federal power in the District of Columbia was held to have violated the due process clause of the Fifth Amendment, quoting from *Schneider* and *Bolling*.

In the instant proceedings, there is no question that Antle's category I employees are totally untouched by the *Bustos* decision even though many of these employees, like Antle's category V, VI, and VII employees, live in Mexico during the period of time the company's operations are adjacent to the Mexican border and have no common law permanent residence with the United States.

The discrimination which would be exercised by the Immigration Service if *Bustos* is permitted to stand is obvious: Persons lawfully admitted as resident aliens to this country would have their status revoked by reason of arbitrary and nebulous principles of "residency".[7] Resident aliens who had failed to establish permanent residences in the common law sense within the United States would be discriminated against in favor of both (a) citizens, regardless of whether they have a permanent residence and (b) resident aliens

7. Query, can a true migrant establish "residence" in a common law sense. See Stumberg, *Principles of Conflict of Laws* (3rd Ed. 1963) at page 36. If the test is subjective intent, how could the Service police such a standard?

who have established a common law permanent residence in the United States.[8]

Thus, the U.S. citizen is free to live in Mexico seven or eight months a year and work in the United States seasonally for less than six months. In so doing, he may earn enough to sustain himself at the lower cost of living in Mexico for the balance of the year. Why should a resident alien not be permitted to do the same thing? Consider the resident alien who has worked full time in the United States and established permanent residency here for a number of years and then decides to "semi-retire," moving to Mexico for part of the year and working only a part of the year in the United States. During the part of the year that he lives and works in the United States, he is as much a resident as most migrants, regardless of whether he has a permanent place of abode.

Furthermore, what difference should it make whether a person lawfully admitted as a resident alien lives in a permanent home or a trailer? Should the latter be excluded from readmission to the United States while the former is free to come and go? Is there any rational reason for discriminating in any way against permanent migrant workers of a United States employer based upon either citizenship or common law residency? Should it make a difference that

---

8. In effect, it is not Congress which has imposed this arbitrary residence standard, but the Service's regulations. Congress merely defined a returning resident alien as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 USC § 1101(a)(27)(B)(1970). Thus, Congress' only requirement is (a) lawful admission for permanent residency in the first instance and (b) return from a temporary residence abroad. The regulations added the requirement that the previously lawfully admitted resident alien also be "returning to an unrelinquished lawful permanent residence in the United States . . ." 8 C.F.R. 211.1(b)(1)(1972). This added requirement discriminates against migrant resident aliens, almost all of whom are of Mexican extraction.

the migrant employer employs his employees on a year-round basis, such as Antle, or is only able to provide seasonal work? Should a resident alien duly admitted as such be required to work for Antle in all of its farming operations throughout the year or may he refrain from working during a portion of that year?

The propounding of these various questions merely exposes the difficult position in which the *Bustos* decision places migrant workers and their employers in this country. Must these workers all establish permanent residences on a year-round basis within the United States? Are they free to continue their practice of living in Mexico during the El Centro harvest season? Is year-round employment for one employer sufficient insulation to protect them from the *Bustos* decision? Must they actually work full time for one employer?

Agriculture's concern with the *Bustos* decision as it presently stands is predicated as much on the fact that these questions are unresolved as it is on the specific holdings of the decision itself.

This court has held that states cannot discriminate between aliens and citizens in their rights to pursue lawful employment. *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131; *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948). While it is conceded that Congress can control the standards for the admission of aliens and their prerequisites for naturalization, not even Congress should be permitted the right to engage in discriminatory conduct which is ". . . so unjustifiable as to be violative of due proces."[9] Any interpretation of the Immigration and Naturalization Act which would discriminate against lawfully admitted resident aliens by reason of the migratory nature of their lawful employment

9. *Bolling v. Sharpe,* Supra, 347 U.S. at 499; 74 S. Ct. at 694.

would be just such an unjustifiable discrimination. Similarly, any law, be it federal or state, which permitted citizens to engage in migratory field work without regard to whether they had a permanent residence but restricted such employment to resident aliens with a permanent residence within the United States would likewise be an unjustifiable discrimination.

Further, restricting where migrant workers may live when they are working adjacent to the Mexican border infringes dramatically upon their personal liberties, including their right to travel and their freedom of association. Their reasons for living in Mexico during those periods are to a large extent predicated on economics and the limited availability of housing in Calexico, but they are also based on the workers' desire to associate with persons of their own culture and background. We do not believe this right should be infringed. We do not believe the Constitution permits such infringement. See *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

Respectfully submitted,

RICHARD D. MALTZMAN
PHILIP B. PASS
Attorneys for Bud Antle, Inc., Amicus Curiae

HASKELL TITCHELL
PAUL R. MALONE
Of Counsel